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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-101

IRWIN BERNIKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS.

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SUBJECT INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions	2
Statement of the Case	2
Statement of the Facts	4
The Second Trial: The Government's Case	5
The Second Trial: The Petitioner's Case	9
The Third Trial: The Government's Case	13
The Third Trial: Defendant's Case	17
Reasons for Granting the Writ	20
I. This Court Should Grant Certiorari to Determine Whether Petitioner's Rights to Due Process and a Fair Trial Were Violated by the Giving of an Instruction Authorizing the Jury to Consider an Attempt to Influence the Testimony of a Witness as Evidence of Guilt at Petitioner's Third Trial and Whether There Was Any Evidence to Warrant the Giving of Such Instruction	20
II. Assuming, Arguendo, That There Was Evidence of an Attempt to Influence a Witness, This Court Should Grant Certiorari to Decide Whether an Instruction Permitting the Jury to Consider an Attempt to Influence the Testimony of a Witness as Evidence of Guilt Was	

Page

Erroneous, Permitted the Jury to Find Petitioner Guilty Without Other Evidence, and Thus Deprived Petitioner of His Constitutional Rights to Due Process and a Fair Trial 23

III.

This Court Should Grant Certiorari to Determine Whether a Third Trial Placed Petitioner Twice in Jeopardy in Violation of His Fifth Amendment Rights Where Entrapment as a Matter of Law Had Been Established at Petitioner's Previous Trial 36

IV.

This Court Should Grant Certiorari to Determine Whether Petitioner's Motion for a Judgment of Acquittal at the Third Trial Should Have Been Granted on the Ground That the Evidence Showed Entrapment as a Matter of Law 47

Conclusion 49

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Alberty v. United States, 162 U.S. 499	30, 32, 35
Allen v. United States, 164 U.S. 492	32
Austin v. United States, 414 F. 2d 1155	35
Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402	22, 36, 47
Carbajal-Portillo v. United States, 396 F. 2d 944	41, 42, 48
Cooper v. United States, 218 F. 2d 39	34, 35
Cornero v. United States, 48 F. 2d 69	44
Downum v. United States, 372 U.S. 735, 83 S. Ct. 1033	43, 44, 45
Green v. United States, 355 U.S. 184, 78 S. Ct. 221	44, 45
Hickory v. United States, 160 U.S. 408	29, 30, 32
Himmelfarb v. United States, 175 F. 2d 924	47
Michuad v. United States, 350 F. 2d 131	22
Miller v. United States, (C.A. D.C. 1963) 320 F. 2d 767	35
Morris v. United States, 326 F. 2d 192	22
Northern v. United States of America, 300 F. 2d 131	37
Notaro v. United States, 363 F. 2d 169	37, 43
People v. Smith, 142 Cal. App. 2d 287, 298 P. 2d 540	33, 34
Petschl v. United States, 369 F. 2d 769	33
Rizzo v. United States, 304 F. 2d 810	32, 33
Sapir v. United States, 348 U.S. 373, 75 S. Ct. 423	47
Sherman v. United States, 356 U.S. 369	37, 47, 48

Page

Simmons v. United States, 142 U.S. 148, 12 S. Ct. 171 44

Sorrels v. United States, 287 U.S. 435 43

Thompson v. United States, 155 U.S. 271, 15 S. Ct. 73 44

United States v. Freundlich, 95 F. 2d 376 24

United States v. Katz, 78 F. Supp. 435, aff'd 173 F. 2d 115 ..... 24, 25

Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834 44

Wallace v. U.S., 243 Fed. 300 25

Wilson v. U.S., 162 U.S. 613, 16 S. Ct. 895, 40 L. Ed. 1090 25

Wong Sun v. United States, 371 U.S. 471 35

Statutes

California Evidence Code, Sec. 413 26

United States Code, Title 1, Sec. XLVI 2

United States Code, Title 21, Sec. 176(a) 3, 4

United States Code, Title 28, Sec. 1254 1

United States Constitution, First Amendment 2

United States Constitution, Fifth Amendment 2, 43

United States Constitution, Sixth Amendment 2

Textbooks

California Jury Instructions, Criminal (3rd Ed.), Sec. 2.04 26

Devitt and Blackmar, Federal Jury Practice and Instructions, Sec. 11.18 .....27, 32

Devitt and Blackmar, Federal Jury Practice and Instructions, Sec. 11.19 .....28, 33

Wigmore on Evidence, Secs. 277-278 25

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS.

Petitioner prays that a writ of certiorari issue to review a judgment of the Ninth Circuit Court of Appeals entered in the above entitled case on March 19, 1971.

Citations to Opinions Below.

The judgment of the Court of Appeals is reported at 439 F. 2d 686. Said opinion is printed and attached hereto and made a part hereof as Appendix A.

Jurisdiction.

The Ninth Circuit Court of Appeals affirmed the conviction of petitioner on March 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

All questions raised in this instant petition were raised in the Court below and on appeal to the Ninth Circuit Court of Appeals.

Questions Presented.

1. Whether petitioner's rights to due process and a fair trial were violated by the giving of an instruction authorizing the jury to consider an attempt to influence the testimony of a witness as evidence of guilt at petitioner's third trial and whether there was any evidence to warrant the giving of such instruction.

2. Whether an instruction permitting the jury to consider an attempt to influence the testimony of a witness as evidence of guilt was erroneous, permitted the jury to find petitioner guilty without other evidence, and thus deprived petitioner of his constitutional rights to due process and a fair trial.

3. Whether a third trial placed petitioner twice in jeopardy in violation of his Fifth Amendment rights, where entrapment as a matter of law had been established at petitioner's previous trial.

4. Whether petitioner's motion for a judgment of acquittal at the second trial should have been granted on the ground that the evidence showed entrapment as a matter of law.

Constitutional Provisions.

The Constitutional provisions involved are the First, Fifth, and Sixth Amendments to the United States Constitution. They are printed in 1 U.S.C. XLVI.

Statement of the Case.

On July 24, 1968 a one count indictment was returned by the Federal Grand Jury for the Central District of California, charging appellant, and one Abraham Geha with concealment and transportation of marihuana after illegal importation in violation of 21

U.S.C. Section 176(a). [C.T. 1][1] entered a plea of not guilty and the case was set for further proceedings before the Honorable Francis C. Whelan, Judge Presiding.

Petitioner filed a Motion for a Severance [C.T. 8-11] and a Motion to Dismiss the Indictment [C.T. 12-18] which were denied. [C.T. 43.] Petitioner's Motion for Pretrial Discovery [C.T. 19-34] was granted in part and denied in part. [C.T. 43.] Petitioner's further motion to dismiss the indictment [C.T. 70-76] was also denied. [C.T. 77.]

The case came on for a jury trial as to petitioner alone on January 23, 1969. [C.T. 135.] Petitioner's Motions for Judgment of Acquittal made at the end of the Government's and defendant's case were denied. [C.T. 78-79.] The jury found petitioner guilty as charged. [C.T. 85.] Motions for New Trial and for a Judgment of Acquittal were denied [C.T. 87], and petitioner was sentenced to seven (7) years imprisonment [C.T. 87.]

A Notice of Appeal was duly filed on February 28, 1969. [C.T. 89.]

On May 27, 1969 the Court of Appeals remanded petitioner's case to the District Court [C.T. 135] and on May 28, 1969 petitioner was notified that the Court would reconsider the Motion for New Trial. [C.T. 92.] On reconsideration the Court set petitioner's case for a new trial. [C.T. 94.]

Petitioner's second jury trial commenced on October 15, 1969. [C.T. 95.] Petitioner's Motions for Judgment of Acquittal made at the close of the Government's

[1]Reference "C.T." is to the Clerk's Transcript.

and defendant's case were denied. [C.T. 95, 96.] Following jury deliberations the Court declared a mistrial and denied Petitioner's Motion for a Judgment of Acquittal. [C.T. 98.] The case was again set for trial.

Petitioner filed a Motion to Dismiss the Indictment or in the alternative to bar the prosectution on the ground that he had been once in jeopardy on the same charge. [C.T. 99-108.] The motion was denied. [C.T. 166.]

Petitioner's third jury trial commenced on March 3, 1970. [C.T. 120.] The jury brought in a verdict of guilty as charged [C.T. 130, 131] and petitioner was sentenced to five (5) years and thirty three (33) days in Federal custody. [C.T. 132.] Petitioner was admitted to and is enlarged on bail pending appeal. [C.T. 132.]

Statement of the Facts.

This is a criminal case charging petitioner with a violation of Title 21, United States Code, Section 176(a), which, in pertinent part, reads:

> "Whoever knowingly, with intent to defraud the United States, receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, is guilty of an offense against the laws of the United States."

The one count indictment charged that:

> "On or about July 9, 1968, in Los Angeles County within the Central District of California, Defendants Irwin Berniker and Abraham Geha, with intent to defraud the United States, knowing-

ly received, concealed and facilitated the transportation and concealment of approximately 47 pounds of refined marihuana, hashish, which said marihuana as the defendants then and there well knew, theretofore had been imported and brought into the United States contrary to law."

Petitioner was tried three times on the above-mentioned charge. This Petition follows a verdict of guilty and a judgment rendered after the third trial. The second trial resulted in a hung jury and a declaration of a mistrial. The proceedings of the second trial are relevant to the within petition.

The Second Trial: The Government's Case.

The Government presented the testimony of three agents for the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs. Special Agent, Stephen M. Swanson testified, in substance, that he met Irwin Berniker on July 8, 1968 at approximately 4:00 to 5:00 P.M. at an apartment house located on Sweetzer Street in Hollywood, California. Petitioner told him he dealt in narcotics and other drugs; that he could supply any quantity or type of drugs desired; that his best connection was for hashish, which he was only interested in selling in large amounts. The hashish "was of an excellent quality and . . . it was from Lebanon". [R.T. 493.][2] The witness testified that petitioner's price per kilogram was $1,500.00, but that for a purchase of between five to ten kilograms the price would be only $1,300.00 per kilo. The witness said he referred to a partner in San Francisco and told petitioner that he would try to get $1,500.00 to purchase one kilo so

[2]Reference "R.T." is to the Reporter's Transcript.

that he could see the quality of the hashish. He testified "Mr. Berniker then asked me for my telephone number, which I gave to him". [R.T. 494.]

Swanson testified that petitioner telephoned him three times. Telephone negotiations resulted in an agreement for the purchase of $10,000.00 worth of hashish. Arrangements were made for petitioner and his partner Abe to meet Agent Swanson and his partner—Agent Barnes—at a Hughes Market located in Hollywood. The appointment was for 3:45 P.M. on July 9, 1968 and petitioner said he and his partner would be in a red Mustang convertible.

Swanson and Barnes drove to the market in a government car. Appellant and Abraham Geha arrived in the red Mustang, got into the government vehicle and made introductions all around. There was further discussion in which Geha said that the hashish "was gold and from Lebanon". Petitioner was shown and counted the money. He then told Swanson the hashish was Geha's and the price had gone up from $1,300.00 per kilogram to $1,500.00.

The witness testified that further arrangements for delivery were made and that all concerned then left the Hughes Market parking lot. They returned about 5:00 P.M. and proceeded to the delivery point.

Petitioner and Swanson went into a Hollywood Boulevard apartment; petitioner asked if the witness could smell the hash; and then petitioner walked to a closet and removed two white plastic bags [Government Exs. 1 and 2] and gave them to the agent. At Swanson's request Mr. Berniker handed him a small scale and the agent weighed the bags, whose total weight was approximately 12 pounds. [R.T. 504.]

They agreed on a price of $9,000.00. When Swanson had placed the hashish in the government vehicle, and had removed the attache case containing $9,000.00, Barnes arrested petitioner and Geha. [R.T. 505.]

A search of the Mustang uncovered a zipper bag [Government's Ex. 4] in which were five additional white plastic bags containing hashish [Government's Ex. 2]. [R.T. 507-508.]

Swanson also testified that at about 3:00 P.M. on July 8, 1968 he received a telephone call from a man named Norman Smith. He and Smith had a conversation relating to another narcotics investigation and "all of a sudden I was talking to a person who identified himself as Irv." [R.T. 509-510.] Irv said he heard that Swanson was interested in doing some business. They arranged to meet at Mr. Smith's house. Swanson identified the telephone voice as that of petitioner.

On cross-examination Swanson stated that Norman Smith was an informant for the Bureau of Narcotics. [R.T. 511.] On or about July 8, 1968 Swanson was aware that Smith had a pending case in Nevada. [R.T. 514-515.] He had had a short discussion with Smith regarding what Smith wanted in return for informing. [R.T. 518.] Swanson stated "I would say he was cooperating so that his cooperation with the Federal Government would be taken in front of the District Attorney, I guess, handling his case. The District Attorney would be supplied with the information that Mr. Smith was cooperating." [R.T. 519.]

Agent Swanson testified that he did not know what had taken place between Smith and petitioner.

Agent David Lawrence Westrate testified to conducting a surveillance of Agents Swanson and Barnes at

the Hughes parking lot on July 9, 1968. [R.T. 541-542.] He also identified his initials on Government Exhibits 1 and 2. [R.T. 544.] The witness identified Government's Exhibit 5 as a small piece of paper taken from petitioner following his arrest [R.T. 546-547] on which was written the phone number of Agent Swanson.

On cross-examination Agent Westrate stated that he had introduced Norman Smith to Agent Swanson prior to July 8, 1968. He knew that Smith was an informant and wanted to get consideration on a Nevada possession of Marihuana case. He could not recall whether Agents Swanson or Barnes were present when Smith discussed the Nevada case, although Agent Mendelsohn, their group leader, may have been. [R.T. 549.] He thought that subsequent to petitioner's arrest Smith mentioned to him a pending case in the San Fernando Valley. [R.T. 551.] He admitted informing a police officer about Smith's cooperation with the Federal Bureau of Narcotics. [R.T. 552-554.]

The witness testified that when Mr. Smith came to his office (to offer his services as an informant) he "advised Mr. Smith . . . that the procedure is if a person cooperates with our office and his cooperation results in the initiation of prosecutable cases against narcotic traffickers, that we bring this information to the attention of the prosecuting attorney who is handling his particular case." [R.T. 554.]

Agent Arthur M. Barnes corroborated Agent Swanson's testimony with reference to the meetings with petitioner on the afternoon of July 9, 1968. [R.T. 558-563.]

On cross-examination the agent stated that he had talked to a deputy district attorney with reference to

Norman Smith's Can Nuys' case [R.T. 568], but was not sure what had been the disposition of Mr. Smith's case. [R.T. 569.]

All of the Government's Exhibits were admitted into evidence, and the Government rested. [R.T. 575.]

Petitioner's Motion for a Judgment of Acquittal on the ground of insufficiency of the evidence was denied. [R.T. 575.]

The Second Trial: The Petitioner's Case.

The defense was entrapment. The petitioner's only witness at the second trial was Norman Irving Smith. He testified that he was a resident of Synanon Foundation in Oakland, California. On June 20, 1968 he had pending against him charges of possession of heroin (Van Nuys, California), possession of marihuana and possession of a stolen gun (West Hollywood, California) and possession of dangerous drugs (Las Vegas, Nevada). [R.T. 589 to 590.] He was using barbiturates and heroin. [R.T. 601.] In order to help himself he went to the Federal Bureau of Narcotics and spoke with Artie Mendelsohn and Dave Westrate. [R.T. 592.] Artie Mendelsohn was in charge. The witness asked Mendelsohn what to do to get out of some of his cases and Mendelsohn told him that he could make cases which could be prosecuted. [R.T. 593.] Mr. Mendelsohn told Smith that he was going to help him because he had influence with other "narcotic agencies like the State agencies where I was arrested, and that they dealt, you know, they could make deals with each other and, you know, like he could straighten my case out for me, either get me, you know, a lenient verdict or get it dropped." [R.T. 594.]

Smith testified that as a result of this conversation he decided he was going to try to get some cases for the Federal Bureau of Narcotics. He did make two himself and was involved in another. One of the cases he made was petitioner's. [R.T. 595.] Prior to making petitioner's case, in early July, 1968, he again spoke with Artie Mendelsohn. [R.T. 598.] This was before Smith met petitioner. [R.T. 599.] Mendelsohn told him that "he would take care of my Las Vegas case for me but that he needed more and wanted more before he could do anything for me in Van Nuys". [R.T. 599.]

Subsequent to this conversation Mr. Smith met at Martin Chester's house. Smith told Mr. Berniker that he was involved in drug sales and that he dealt in large quantities of drugs. [R.T. 600-601.] He asked petitioner if he wanted to get involved in drug sales, and petitioner replied "no". [R.T. 602.]

The witness testified that he saw petitioner at a Hughes Market located on Franklin and Highland in Hollywood about two days after he first met him. [R.T. 603.] Petitioner was with two girls and Abe Geha. He and Geha talked about marihuana and hashish. [R.T. 604.] Smith testified that he began to think in terms of setting up a deal. [R.T. 605.] He talked with petitioner and told him that Geha said there was a large amount of hashish available but that he wouldn't deal with Smith because he didn't know him. Smith told petitioner that "we can make a large amount of money if he could get Abe to make a deal . . . that I had some people that had money that were looking for—to buy hashish and they have been looking to buy it for quite a long time, and that, you know, we could both make a lot of money, you know, if, you know, he

could talk Abe into making this deal. [R.T. 610.] The amount of money mentioned was $10,000.00.

Petitioner said he did not want to get involved. [R.T. 611.] Smith testified that he mentioned money again and told petitioner that he, Smith, was very strapped for money and that it would help him out. He just kept harping on the money. [R.T. 611.]

Petitioner listened and then again said "no", that he didn't want to get involved with it. [R.T. 611.]

Smith testified that it was his intention to have petitioner arrested so that it would help his own case. "I was hoping that Irv would be arrested and it will relieve, you know, the pressure off my case and I would keep myself from going to jail, which is what I was working on". [R.T. 613.]

Smith told the petitioner to come over to his place and listen to a phone call which he, Smith, would place to a man who wanted to buy hashish. Then petitioner could decide what he wanted to do. [R.T. 614.]

On cross-examination Smith testified that he placed telephone calls to Agent Swanson, and that during the course of one of the calls petitioner picked up the telephone and proceeded to talk with Swanson. [R.T. 618.] Later that day Smith introduced petitioner to Agent Swanson. [R.T. 618.] Mr. Geha was present at the time. [R.T. 620.]

After petitioner's arrest Mr. Smith spoke with one of the narcotic agents, probably Arthur Barnes. [R.T. 625-626.] His Van Nuys case was disposed of after petitioner's arrest.

Following the testimony of Mr. Smith, the defense rested. [R.T. 649.]

The defendant made a Motion for a Judgment of Acquittal on two grounds: insufficiency of the evidence; and entrapment as a matter of law. [R.T. 671.] It was argued that the evidence of entrapment was undisputed and that the Court should therefore direct a Judgment of Acquittal on the entrapment ground. The Court reserved its ruling on the motion. [R.T. 679.]

The Court gave the Mathes and Devitt 10.2 revised instruction on entrapment.

Defendant's request for a special instruction relating to the fact that Norman Smith was a Government Agent was denied. [R.T. 725.]

In the course of jury deliberations, and at the request of the jury, the testimony of Norman I. Smith was re-read. Subsequently, the jury asked two questions:

> "Entrapment. Is this the situation whereby the defendant by the acts of the Government is induced to do something he would not normally do? Define 'normally'.
>
> "2. Can someone who regularly deals in narcotics be entrapped in a narcotics deal? Thomas E. Nunnelly." [R.T. 756.]

In the absence of counsel the Court referred the jury to the instructions previously given. [R.T. 756-757.] When informed, counsel for Mr. Berniker requested that the Court answer question No. 2 "whether a person who regularly deals in narcotics can be entrapped. I would say that the answer is Yes as a matter of law". [R.T. 758.] The Court disagreed and subsequently re-read to the jury the entrapment instruction originally given. [R.T. 773-774.]

After deliberating approximately five hours over a period of two days the Court received a note from the jury which read:

> "The jury has apparently reached a position where each person has made his own decision and will not deviate therefrom.
>
> "Have you any further charge to make to this panel?
>
> "Voting is exactly as it was early Friday.
>
> "(Signed) Thomas E. Nunnelly". [R.T. 775.]

Without instructing the jury further because the Court was of the opinion that the Allen instruction would not be beneficial the Court declared a mistrial [R.T. 776] and denied petitioner's Motion for a Judgment of Acquittal. [R.T. 777.]

Petitioner's motion to dismiss the indictment because he had been once in jeopardy was denied and the case was set for re-trial. [R.T. 784.]

The Third Trial; The Government's Case.

Government Agents Swanson, Barnes and Westrate testified on behalf of the Government. Their testimony was substantially similar to what it had been at the second trial. The substance of their testimony was that the informant, Smith, introduced Swanson to the appellant on July 8, 1968. Petitioner negotiated a sale of hashish with Swanson. The delivery took place on July 9, 1968 following three telephone calls from appellant to Swanson, and two meetings between petitioner, Abraham Geha, Agent Swanson and Agent Barnes at Hughes Market in Hollywood. The delivery consisted of slightly less than 12 pounds of hashish for which the agreed upon price was $9,000.00. After

petitioner's arrest a search of the Mustang convertible in which he and Geha had been driving revealed more hashish.

The testimony of the agents was to the effect that petitioner claimed to be negotiating on behalf of Geha who was the owner of the hashish.

Prior to July 8, 1968 the agents had been aware of Smith's difficulties with the law. They had expressed to him a willingness to inform law enforcement agencies of his cooperation with the Federal Bureau of Narcotics. The purpose of Smith's work was to make cases for the Bureau. [R.T. 924, 929, 933, 964-966.] Agent Westrate testified that he telephoned Las Vegas several times to inform prosecutors there of Smith's cooperation with the Bureau. [R.T. 972-973, 974-975.]

Norman Irving Smith testified on behalf of the Government. He said that he resided at Synanon House in Oakland, California, but that on July 8, 1968 he lived at Sweetzer and Fountain Avenues in Hollywood, California. [R.T. 977.] He testified that he had become acquainted with petitioner four to six months prior to July 8, 1968; that appellant had come to his apartment twenty to thirty times and had smoked marihuana with him ten times and shot heroin twice. [R.T. 978-979.] The witness testified that in May, 1968 he had sold twenty five kilos of marihuana to petitioner and had dropped the merchandise off at petitioner's residence, but had been paid by someone else. He further testified that when he approached petitioner with reference to this first transaction petitioner refused to participate, but he then told Smith he had won some money and was willing to be involved. [R.T. 981-983.]

Smith testified that he knew Agent Swanson and introduced petitioner to him. He made the first phone contact between petitioner and Swanson. [R.T. 984-986.] He also stated that defendant's reluctance to become involved in the July sale of hashish was because of his fear that Swanson was a government agent. [R.T. 988-989.]

Smith testified that after petitioner was arrested he (Smith) pleaded guilty to his case pending in Van Nuys, and was sentenced to probation on condition that he reside at Synanon. [R.T. 990.]

The witness recanted the testimony he had given on behalf of defendant in the second trial. He testified that on September 10, 1969 Richard Sherman, Mr. Berniker's attorney, came to see him and asked him to sign an affidavit. [Government Ex. 6.] [R.T. 994.] He signed the affidavit because Mr. Sherman told him that if he signed it he wouldn't have to come to Court to testify; and because he thought it would help appellant in beating his case. [R.T. 995.] Smith stated that the facts contained in the affidavit were not true. [R.T. 994.] On October 1, 1969 petitioner and his attorney saw the witness at Synanon in Oakland. [R.T. 993.] On October 15, 1969 Smith and an escort came from the Oaklad Synanon to Santa Monica. They met petitioner and his attorney and together with a friend of petitioner's went to a coffee shop. [R.T. 999.] At the coffee shop Smith and the attorney reviewed the facts of petitioner's case. [R.T. 999.]

Smith stated that prior to being presented with the September 10, 1969 affidavit he had not made the following statements, and his testimony at the second trial with reference to these statements was false:

Benefits as a result of activities as an informer for the Federal Bureau of Narcotics would be on the basis of arrests and convictions of other persons [R.T. 1006-1007, 1009]; the first time he had met petitioner was in July, 1968 [R.T. 1007]; he had told petitioner he could make a great deal of money in the drug business [R.T. 1008]; prior to July 8, 1968 petitioner had ever told him he was not interested in becoming involved with narcotics [R.T. 1008]; he had ever met or spoken with Abraham Geha or anyone at Hughes Market on July 8, 1968 [R.T. 1008]; he had ever told petitioner what to say on the telephone to Agent Swanson [R.T. 1008]; and he had ever said "there is no question in my mind but that Irwin Berniker would never become involved in any narcotics transaction if it were not for my constant inducement and persuasion as an informant for the Federal Bureau of Narcotics". [R.T. 1009.]

On cross-examination the witness testified that on September 10, 1969 Mr. Sherman asked him to sign the affidavit if it were correct [R.T. 1013, 1014], and he signed it [the original was offered as Deft's Ex. A.]

Smith testified that prior to testifying at the second trial he at no time denied any of the facts stated in the affidavit. At the October 15, 1969 meeting to discuss his testimony he answered Mr. Sherman's questions substantially as the facts appeared in the affidavit. [R.T. 1077-1119.] He identified the notes taken by Mr. Sherman at that meeting [Deft. Ex. B.]

Smith admitted that at the time he talked with petitioner about the deal which became the subject of the prosecution petitioner told him emphatically "no" and the witness believed he meant it, but pursued the question for his own motives, his desire to stay out of prison and continue taking drugs [R.T. 1159-1160.]

Smith testified that he was still on probation and that he changed his testimony between the second and third trials because he was afraid that his probation might be revoked. [R.T. 1172, 1181.] Prior to testifying at the third trial he had talked with a Deputy United States Attorney and narcotics agents four times with regard to his new testimony. [R.T. 1173.]

Defendant's Exhibit A and Government's Exhibits 4 through 6 were admitted into evidence. [R.T. 1217, 1218, 1221.]

The Third Trial: Defendant's Case.

Richard Krelitz Freshman testified that he was present at the coffee shop meeting on October 15, 1959, and had heard attorney Richard Sherman ask questions and Smith reply. [R.T. 1241-1242.] He stated that Mr. Sherman did not suggest or give answers to the questions he asked and that Smith did not constantly refer to the affidavit. [R.T. 1250-1251.]

Richard Gilbert Sherman, petitioner's attorney during the first and second trials testified that he prepared the affidavit which Smith signed based upon his understanding of the facts derived from petitioner's first trial; from petitioner himself; and from facts within

his knowledge as a result of a related case. [R.T. 1262-1263.] Some of the facts in the affidavit were prepared from the prior testimony of the narcotics agents, given at a trial of someone other than petitioner. [R.T. 1274.]

Mr. Sherman's memorandum of his September 10, 1969 meeting with Smith was marked as Defendant's Exhibit C and his notes of the coffee shop meeting were marked as Defendant's Exhibit D. [R.T. 1264, 1278.]

Alexandra Lee Johnson testified that on July 8, 1968 defendant met her at her home and that they went to Abraham Geha's apartment and from there to the Hughes Market in Hollywood. They ran into Smith there [R.T. 1323-1326.] She overheard Smith say to petitioner "don't be a fool, there is $10,000.00 for you". [R.T. 1327.] His tone of voice was emotional and stern, and he had his hands on petitioner's shoulders. The witness also testified that she did not see petitioner place a telephone call during the afternoon nor in the evening. [R.T. 1333-1334.]

The petitioner Irwin Berniker, testified that he first met Norman Smith in July, 1968 at Martin Chester's apartment. Smith asked him to join in his drug deals but he declined. [R.T. 1338-1339.] He first met Abraham Geha through a girl named Shawn Day at Los Angeles International Airport on July 7, 1968. [R.T. 1340.] On July 8, 1968 Alexandra, Shawn, Geha and appellant went to the Hughes Market where they

ran into Smith and Smith and Geha became involved in a conversation. [R.T. 1343-1344.]

Petitioner testified that Smith tried to induce him to become involved in the sale of hashish; told him that Geha could obtain a large quantity of hashish to sell but that he would not deal with Smith; that he, Smith, was addicted to heroin and was very sick and needed help badly; and that petitioner had to talk Geha into dealing with him. Petitioner said "no, absolutely not"., [R.T. 1345.] Smith persisted and again told him how sick he was, that he was addicted to heroin and other drugs for a long time and that he made a lot of money in drug sales and that his habit cost him a great deal of money so that he needed this opportunity. Petitioner testified that Smith urged him to persuade Geha that it was alright to deal with Smith. He testified that Smith put his hands on his shoulders and said "listen to me. If what this man says is true, I will give you $10,000.00". [R.T. 1346.]

Petitioner testified that later he and Geha went to Smith's apartment and Smith said he would call the man who was willing to spend a great deal of money for a deal that Smith could put together. Smith then placed a telephone call, and petitioner spoke with the man, whom he later met. The man was Agent Swanson. [R.T. 1348-1349.]

Petitioner testified that there was no way that he could have been involved in the transaction if it had not been for Mr. Smith. [R.T. 1349.]

REASONS FOR GRANTING THE WRIT.

I.

This Court Should Grant Certiorari to Determine Whether Petitioner's Rights to Due Process and a Fair Trial Were Violated by the Giving of an Instruction Authorizing the Jury to Consider an Attempt to Influence the Testimony of a Witness as Evidence of Guilt at Petitioner's Third Trial and Whether There Was Any Evidence to Warrant the Giving of Such Instruction.

At the request of the government the Court gave the following instruction. [R.T. 1484-1485]:

> "When a defendant intentionally attempts to influence the testimony of a witness, the jury may consider whether this evidence points to a consciousness of guilt.
>
> Therefore, if you should find from the evidence in this case that the defendant Berniker influenced or attempted to influence the testimony of Norman Smith, you may consider this as evidence of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement to establish his innocence."

It is submitted that this instruction was unrelated to the evidence, and that giving it prejudiced petitioner. For those reasons appellant objected to the instruction at the third trial. [R.T. 1405-1408.]

There is no evidence in the record that petitioner "influenced or attempted to influence the testimony of Norman Smith." In summary, the only evidence relating to contracts between petitioner and Smith prior to

the time when Smith testified at petitioner's second trial is as follows:

Prior to September 10, 1969 petitioner telephoned Smith. There was no discussion of the facts of the case or any of the facts contained in Government's Exhibit 6. Petitioner asked Smith if he could help him as far as his case was concerned, and Smith said yes, he would do whatever he could. [R.T. 998.] On September 10, 1969 Richard Sherman, then petitioner's attorney, saw Smith and asked him to read an affidavit, which if true, he should sign. Smith read and signed the affidavits. Petitioner then subpoenaed Smith to testify at the second trial. Thereafter, on October 15, 1969 Smith, petitioner and his attorney, and two other people met so that Smith and counsel for petitioner could review Smith's testimony. Smith saw the affidavit at that time and referred to it when answering some of the attorney's questions.

At first Smith testified that no one said anything to him in regard to his being the only witness [R.T. 1000], but, following a recess, Smith testified that petitioner told him he would be the only witness and that the case relied mainly on him. [R.T. 1005.] Smith testified that nothing was said to him with regard to money except that his expenses and the expenses of an escort would be taken care of. [R.T. 1006.]

It is submitted that there was neither direct evidence in the record that petitioner had attempted to, or had influenced Norman Smith; nor was there an inference of petitioner's misbehavior in this regard. It is the

judge's duty to guide the jury by appropriate legal criteria through the maze of facts before it. *Bollenbach v. United States,* 326 U.S. 607, 66 S. Ct. 402 (1946). In giving instructions, the Court should exercise care not to confuse the jury with non-existent issues and to place emphasis upon questions not properly before it. The danger of an irrelevant instruction is that the jury may be led to indulge in conjecture (*Morris v. United States,* 326 F. 2d 192 (9th Cir. 1963) and the interjection of the false issue may be sufficient to nullify proper consideration of the real issues in the case. The proper administration of justice is thereby thwarted. *Michaud v. United States,* 350 F. 2d 131 (10th Cir. 1965).

In the instant case the major issue was the subject of conflicting testimony. It was of critical importance to petitioner that his version of the facts, and Smith's original testimony, be believed. Thrusting questions of "influencing testimony" into the case not only permitted the jury to speculate as to petitioner's state of mind and consciousness of guilt, but gave credence to the informant's rejection of his prior testimony. It negated the informant's own testimony that he had changed his testimony partly out of fear of government reprisal—revocation of probation—and placed undue emphasis upon an unproven possibility that he had been "purchased" as a witness at the second trial.

Regardless whether the remaining evidence in the case might be sufficient to sustain a conviction, the erroneous instruction on an issue which went to the heart of petitioner's defense was prejudicial to appellant. As the Supreme Court said in *Bollenbach* "(T)he question is not whether guilt may be spelt out of a rec-

ord, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." (326 U.S. at 614).

II.

Assuming, Arguendo, That There Was Evidence of an Attempt to Influence a Witness, This Court Should Grant Certiorari to Decide Whether an Instruction Permitting the Jury to Consider an Attempt to Influence the Testimony of a Witness as Evidence of Guilt Was Erroneous, Permitted the Jury to Find Petitioner Guilty Without Other Evidence, and Thus Deprived Petitioner of His Constitutional Rights to Due Process and a Fair Trial.

The instruction dealing with an attempt to influence a witness and which has been set forth in full, *ante,* page 20 (Government's Instruction No. 10), was given as submitted. [R.T. 1484-1485.] with the exception that the Court struck the words "or someone acting on his behalf". [C.T. p. 127.] Counsel for Petitioner objected to the giving of the instruction [R.T. 1405] and there was discussion concerning the giving of the instruction. [R.T. 1422.]

We submit that Government Instruction No. 10 is an incorrect statement of the law and highly prejudicial. The first portion states:

> "When a defendant intentionally attempts to influence the testimony of a witness, the jury may consider whether this evidence points to a consciousness of guilt".

The instruction does not require the defendant to attempt to influence the witness to give false, untrue or inaccurate testimony but allows the jury to infer a *consciousness of guilt* from a mere attempt to "influence

the testimony". Supposing that a defendant merely seeks to influence a witness to testify truthfully or seeks to influence a witness to refuse to omit pertinent testimony? As the instruction was given a request that a witness speak the truth could infer a consciousness of guilt. This hardly seems logical.

The second paragraph of the instruction authorizes the jury to consider, as *evidence of guilt,* Petitioner's influencing or attempting to influence the testimony of Norman Smith. This appears patently erroneous since it goes beyond the jury's being permitted to infer *consciousness of guilt* and permits the jury to find *evidence of guilt* itself from any attempt to influence Smith's testimony.

The second sentence of the second paragraph also appears patently erroneous and conflicting with the first two sentences of the instruction since the last sentence deals with invention or fabrication of an explanation whereas the first two sentences permit the jury to find guilt from any attempt to influence testimony whether the testimony sought to be influenced was truthful or perjurious. Thus, while the third sentence seems to permit an inference from an intent to invent or fabricate testimony, the first two sentences seem to permit an inference of guilt irrespective of the nature or content of the testimony sought to be induced.

The government cited two cases as the basis for this instruction [C.T. 127], *United States v. Freundlich,* 95 F. 2d 376, 378-379 (2nd Cir. 1938) and *United States v. Katz,* 78 F. Supp. 435, 438 (M.D. Pa. 1948) affirmed 173 F. 2d 115 (3rd Cir. 1949).

Neither one of these two cases dealt with the giving of any instruction such as given here. In *Freundlich,*

the court held that if the defendant was trying to influence the witness's testimony regardless of the truth, it is of course well settled that that was evidence of guilt. *Wilson v. U.S.*, 162 U.S. 613, 620, 621, 16 S. Ct. 895, 40 L. Ed. 1090; *Wallace v. U.S.*, (7th Cir.) 243 Fed. 300; *Wigmore on Evidence,* Sections 277-278, but said (95 F. 2d 376, 379).

> "If, on the other hand, he was merely trying to bring Peckman's memory into accord with what he, himself believed to be true, the testimony did no harm, though it was not relevant . . ."

The case does *not* discuss whether any *instruction* was given with respect to this subject.

Katz involved a situation where there was an attempt to bribe a witness and to suborn perjury. The court held that *evidence* of this was clearly admissible and said (78 F. Supp. 435, 438).

> "Evidence of the misconduct of a party in connection with the trial of his case is admissible as tending to show that the party guilty of the misconduct is unwilling to rely on the truth of his cause. McHugh v. McHugh, 186 Pa. 197, 40 A. 410, L.R.A. 805, 65 Am. St. Rep. 849. This doctrine is applicable to criminal proceedings. Commonwealth v. Brown, 23 Pa. Super. 470-502; Commonwealth v. Marion, 232 Pa. 413 at 423, 81 A. 423, a case where the defendant authorized and directed another to make the solicitation for him. Commonwealth v. Spardute, 278 PA. 37 at 43, 122 A. 161; McMeen v. Commonwealth, 114 Pa. 300, 306, 9 A. 876; Commonwealth v. Lettrich, 346 Pa. 497, 31 A. 2d 155; Gung You v. Nagle, 9 Cir. 1929, 34 F. 2d 848, 850. See Section

278 Wigmore, 3d Ed. p. 120 and cases cited. "So, if you can show that a plaintiff has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive; * * * but it is always evidence.' Moriarity v. R. Co., L.R. 5 Q.B. 319; see also Shaw C.J. in Commonwealth v. Webster, 5 Cush. 295, 316, 59 Mass. 295, 52 Am. Dec. 711."

California has enacted *California Evidence Code Section* 413 which does not go nearly as far as the instruction given in this case. It states:

> "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, *or, his willful suppression of evidence relating thereto,* if such be the case." (Italics ours).

As a matter of fact, consciousness of guilt is *never* sufficient of itself to prove guilt and the Berniker jury should have been so instructed. For example, see California Jury Instructions, Criminal. (Caliic) 2.04 (3rd Edition) which charges the jury:

> "Evidence that a defendant attempted to persuade a witness to testify falsely or tried to manufacture evidence to be produced at the trial, may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your determination."

We submit that the foregoing California instruction is a correct statement of the law and that the instruction given to petitioner's jury was incorrect and prejudicial. It should be noted that the California instruction cautions the jury that evidence of an attempt to persuade a witness to testify falsely is not sufficient in itself to prove guilt and that the weight and significance, if any, of such attempt are matters for the jury to determine.

The net effect of the instruction given in petitioner's instance, was to permit the jury to find petitioner guilty if it found that he influenced or attempted to influence the testimony of witness Smith.

It should further be noted that the California instruction applies only to attempts to procure false or manufactured evidence, whereas petitioner's jury was instructed that it was permitted to consider, as evidence of guilt, a mere attempt to influence the testimony of a witness (whether the testimony sought to be influenced was false or truthful).

Government instruction No. 10 erroneously confused "consciousness of guilt" and "evidence of guilt".

We are unable to locate any authority which permits acts or conduct evidencing a "consciousness of guilt" to suffice as "evidence of guilt". For example, the flight or concealment of a defendant following the commission of a crime may be evidence of a consciousness of guilt but its significance is limited. Thus, *Devitt and Blackmar* "Federal Jury Practice and Instructions" Section 11.18 formulates the instruction with respect to flight or concealment as follows:

> "The intentional flight or concealment of a defendant immediately after the commission of a

crime or after he is accused of a crime that has been committed, is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

[In your consideration of the evidence of flight (concealment) you should consider that there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police, or reluctance to appear as a witness. Let me suggest also that a feeling of guilt does not necessarily reflect actual guilt].

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence."

Clearly, even an attempt to suppress or fabricate evidence by a defendant after a crime has been committed, is not sufficient to establish guilt. The instruction in such a situation is formulated in *Devitt and Blackmar* "Federal Jury Practice and Instructions", Section 11.19 as follows:

"An attempt to suppress or to fabricate evidence by a defendant after a crime has been committed, is not of course sufficient to establish guilt. You may consider evidence of such an attempt, however, along with the other evidence in the

case, in determining guilt or innocence. Whether or not attempts at fabrication or suppression of evidence show consciousness of guilt, and the significance to be attached to any such attempt, are matters for the jury to determine."

This court long ago recognized the danger of inferring, presuming or establishing guilt from the acts or conduct of an accused following the commission of a crime.

In *Hickory v. United States,* (1895) 160 U.S. 408, this Court reversed a judgment of conviction for murder because of error in the court's charge to the jury concerning the accused's actions which indicated a consciousness of guilt. Speaking for the Court, Justice White said:

"It is undoubted that acts of concealment by an accused are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creating a legal presumption of guilt; *they are mere circumstances to be considered and weighed in connection with other proof with that caution and circumspection which their inconclusiveness, when standing alone, requires.* The rule on the subject has had nowhere a clearer and more concise expression than that given by Chief Justice Shaw in the *Webster* case, to which the trial court adverted. *Com. v. Webster,* 5 Cush. 295, 52 Am. Dec. 711. The learned Chief Justice said: 'To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons; all

or any of which tend somewhat to prove consciousness of guilt, and when proved exert an influence against the accused. The consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. Such was the case, often mentioned in the books and cited here yesterday, of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as his niece. The deception was discovered and naturally operated against him, though the actual appearance of the niece alive afterwards proved conclusively that he was not guilty of the murder' " (Emphasis ours.)

That same year, this court again had occasion to express itself on the weight and value of acts or conduct evidencing a consciousness of guilt and on the inferences and presumptions to be drawn therefrom. In *Alberty v. United States,* (1895) 162 U.S. 499, this court reversed a judgment of conviction for murder citing *Hickory v. United States, supra,* and stated:

"The weight which the jury is entitled to give to the flight of a prisoner immediately after the commission of a homicide was carefully considered by this court in the case of *Hickory v. U.S.,* 160 U.S. 408 [ante. 269], in which a charge, substantially in the language of the instruction assigned as erroneous in this case, was held to be tantamount to saying to the jury that flight created

a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as axiomatic truth, and as such that it was error.

We do not find it necessary to repeat the argument that was made in that case, but we think it was especially misleading for the court to charge the jury that, from the fact of absconding, they might infer the fact of guilt, and that flight 'is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong, as the case may be, a confession; and it comes in with the other incidents, the corpus delicti being proved from which guilt may be cumulatively inferred.' While undoubtedly the flight of the accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt; at the same time as was observed in *Ryan v. People* 79 N.Y. 593, 'there are so many reasons for such conduct consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has ben allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances' . . .

The criticism to be made upon this charge is, that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt."

Instruction No. 10 advised the jury that if they found that Berniker had influenced or attempted to in-

fluence the testimony of witness Smith, they might "consider this as evidence of guilt". The charge was patently erroneous. The most that could have been said for Berniker's acts, if true, was *not* that his acts were "evidence of guilt" *but* that they had "a tendency to establish his guilt". As this court pointed out in *Allen v. United States,* 164 U.S. 492:

> "The flight of the accused is competent evidence against him as having a tendency to establish his guilt". (164 U.S. at p. 499.)

The *Allen* court, however did not retreat from its previous holdings in *Hickory* and *Alberty*. Indeed, it cited those cases and pointed out that the court's instruction in *Hickory* was error since it was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and conclusive that it was the duty of the jury to act on it as axiomatic truth and that it had found error in the instructions in *Alberty* because the *Alberty* trial court had used the same language and added that from the fact of absconding the jury might infer the fact of guilt . . .

Thus, a wide distinction exists between evidence which may have a *tendency* to establish a defendant's guilt and acts which are *evidence* of guilt itself.

The court, in the trial which is the subject of this Petition *did not* caution the jury in the language of Devitt & Blackmar Instructions 11.18 and 11.19 and failed to advise the jury that whether or not any attempted fabrication or suppression showed consciousness of guilt the significance to be attached to any such attempt were matters for the jury to determine.[3, 4]

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[3]Compare the instruction given on the effect and significance of false statements by an accused approved in *Rizzo v. United*

In *People v. Smith,* (1956) 142 Cal. App. 2d 287; 298 P. 2d 540, the California Court of Appeal disapproved the propriety of the giving of a far less heinous instruction in a situation where the defendant allegedly fabricated alibi evidence. The trial court gave the following instruction:

> "Evidence, if any, that defendant, on one or more occasions other than from the witness stand, made false, contradictory or misleading statements concerning the charge against him which now is being tried (or that he endeavored to procure false of fabricated evidence to be produced at the trial) may be considered by the jury as a circumstance tending to prove a consciousness of guilt, but is not sufficient of itself to prove guilt. The weight to be given to such a circumstance, and the significance, if any, to be attached to it, are matters for the jury to determine."[5]

States, (8th Cir. 1962) 304 F. 2d 810, where the instruction was far less onerous than the one given here and merely advised the jury that they could consider certain circumstances as "evidence of said defendant's *guilty conscience* regarding the matter under inquiry".

[4]It is noteworthy that the government, in its proposed Instruction No. 10 [C.T. 127], requested that the court charge the jury that an act by petitioner "or someone acting on his behalf" might be considered as evidence of guilt. The trial court properly struck the words "or someone acting on his behalf" from the proposed instruction and, as amended, charged the jury in the language of government's proposed Instruction No. 10. Had the trial court failed to strike the above quoted portion of Instruction No. 10, the instruction would further have been erroneous under the rule expressed in *Petschl v. United States,* (8th Cir. 1966) 369 F. 2d 769. However, for the reasons set forth herein, the instruction was nevertheless fatally defective.

[5]Although the giving of this instruction was disapproved, it is significant that the California court cautioned the jury that the acts or statements of the defendant might be considered by the jury as a circumstance tending to prove a consciousness of guilt but is not sufficient of itself to prove guilt. Petitioner's jury was not so cautioned but was permitted to consider the actions of petitioner as *evidence of guilt* itself.

Said the Court of Appeal (*People v. Smith, supra*) at page 295:

> "The giving of that instruction was unfortunate. The fact that appellant offered his alibi, testified in support of it and called witnesses in support thereof is not such behavior as would justify the instruction. To justify such an instruction, the defendant must be guilty of having made some positive attempt to mislead the jury with reference to the act of which he was accused."[6]

In *Cooper v. United States*, (C.A. D.C. 1954) 218 F. 2d 39, a robbery had occurred. The appellant went to a cousin, told her he was in trouble, and asked her to tell all inquirers that she was with him in Warsaw, North Carolina on the day of the robbery. The cousin was in fact not in Warsaw that day. The Court of Appeal reversed a judgment of conviction stating:

> "Much is made of his request to his cousin about being in Warsaw, but, in the absence of any probitive—indeed, any competent—evidence that he was not in Warsaw, his plea to her is as explained by terror at his plight as by guilt. Had this evidence been coupled with proof that he was not in Warsaw that day, his request to his cousin could be used to show his consciousness of guilt, but standing alone it is explained by terrorized innocence as well as by a sense of guilt. After all, innocent people caught in a web of circumstances frequently become terror-stricken."

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[6]Here, the jury at petitioner's third trial was never sought to be misled. Although the witness Norman Smith had testified favorably to petitioner at the *second* trial on the issue of entrapment, he apparently recanted and his testimony was quite unfavorable to petitioner at the *third* and final trial which resulted in petitioner's conviction.

A similar type of instruction dealing with flight of the accused, not nearly as prejudicial as the instruction now before this court, was disapproved by the Court of Appeals for the District of Columbia Circuit in *Austin v. United States,* (1969) 414 F. 2d 1155, wherein the court charged the jury in the following language:

> "One factor you may take into account is whether or not you find that there has been flight or concealment by the defendant after a crime has been committed. This does not create a presumption of guilt. You may consider evidence of flight or concealment, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight or concealment by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive."

The Court of Appeals cited *Alberty v. United States, supra; Cooper v. United States, supra* and *Wong Sun v. United States,* 371 U.S. 471, and quoted approvingly from *Miller v. United States,* (C.A. D.C. 1963) 320 F. 2d 767, pointing out that the jury should be instructed that they are not to presume guilt from flight and further pointing out that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. The Court, concluded (*Austin v. United States, supra,* at page 1157):

> "It should be clear that *Wong Sun* and *Miller,* have pointed inescapably to the fact that flight instructions should be used sparsely, and when used should be accompanied by a fuller explana-

> tion by the judge of the variety of motives which might prompt flight, and thus of the caution which a jury should use before making the inference of guilt from the fact of flight. It is apparent that the instruction in this case (and the D.C. Bar Association instruction which served as its basis) fell short of such a full explanation. We hold that an inadequate charge such as the present one is erroneous."

The instruction complained of was thus patently erroneous and highly prejudicial to petitioner. As this court said in *Bollenbach v. United States,* (1945) 326 U.S. 607, 614, 615:

> "It would indeed by a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading . . . accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must, therefore, be disregarded . . ."

III.

This Court Should Grant Certiorari to Determine Whether a Third Trial Placed Petitioner Twice in Jeopardy in Violation of His Fifth Amendment Rights Where Entrapment as a Matter of Law Had Been Established at Petitioner's Previous Trial.

The Petitioner's position is that because entrapment as a matter of law had been established in the second trial, it was error for the Court to deny the petitioner's motion for judgment of acquittal and subject him to double jeopardy by a third trial. [C.T. 99-107.]

The question of whether or not the denial of a motion for judgment of acquittal can be reviewed after a mis-trial and subsequent conviction on retrial is not one which has been the subject of a significant amount of litigation. A case from the Sixth Circuit, *Northern v. United States of America,* 300 F. 2d 131, 133 (6th Cir. 1962), is directly in point and holds that such a denial would be reviewable in a subsequent prosecution where a conviction resulted. Was entrapment as a matter of law established in the second trial of this case? That there can be entrapment as a matter of law is a doctrine well established in Federal Jurisprudence, *Sherman v. United States,* 356 U.S. 369, 372 (1968); *Notaro v. United States,* 363 F. 2d 169, 172-3 (9th Cir. 1966).

The government, in its case in chief, presented a fairly standard marijuana situation where petitioner was ready, willing, and able to sell marijuana to a government agent at their first meeting. This agent knew the meeting between petitioner and himself had been arranged by an informant named Smith who was cooperating to benefit himself regarding a Nevada prosecution. [R.T. 519.]

The defense was entrapment. The petitioner's only witness at the second trial was Norman Irving Smith. He testified that he was a resident of Synanon Foundation in Oakland, California. On June 20, 1968, he had pending against him charges of possession of heroin (Van Nuys, California), possession of marijuana and possession of a stolen gun (West Hollywood, California) and possession of dangerous drugs (Las Vegas, Nevada). [R.T. 589-590.] He was using barbiturates and heroin. [R.T. 601.] In order to help himself he went to the Federal Bureau of Narcotics and spoke

with Artie Mendelsohn and Dave Westrate. [R.T. 592.] Artie Mendelsohn was in charge. The witness asked Mendelsohn what to do to get out of some of his cases and Mendelsohn told him that he could make cases which could be prosecuted. [R.T. 593.] Mr. Mendelsohn told Smith that he was going to help him because he had influence with other "narcotic agencies like the State agencies where I was arrested, and that they dealt, you know, they could make deals with each other and, you know, like he could straighten my case out for me, either get me, you know, a lenient verdict or get it dropped." [R.T. 594.]

Smith testified that as a result of this conversation he decided he was going to try to get some cases for the Federal Bureau of Narcotics. He did make two himself and was involved in another. One of the cases he made was petitioner's. [R.T. 595.] Prior to making petitioner's case, in early July, 1968, he again spoke with Artie Mendelsohn. [R.T. 598.] This was before Smith met petitioner. [R.T. 599.] Mendelsohn told him that "he would take care of my Las Vegas case for me but that he needed more and wanted more before he could do anything for me in Van Nuys". [R.T. 599.]

Subsequent to this conversation Mr. Smith met petitioner at Martin Chester's house. Smith told Mr. Berniker that he was involved in drug sales and that he dealt in large quantities of drugs. [R.T. 600-601.] He asked petitioner if he wanted to get involved in drug sales, and petitioner replied "no". [R.T. 602.]

The witness testified that he saw petitioner at a Hughes Market located on Franklin and Highland in Hollywood about two days after he first met him [R.T.

603.] Petitioner was with two girls and Abe Geha. He and Geha talked about marijuana and hashish. [R.T. 604.] Smith testified that he began to think in terms of setting up a deal. [R.T. 605.] He talked with petitioner and told him that Geha said there was a large amount of hashish available but that he wouldn't deal with Smith because he didn't know him. Smith told petitioner that "we can make a large amount of money if he could get Abe to make a deal . . . that I had some people that had money that were looking for—to buy hashish and they have been looking to buy it for quite a long time, and that, you know, we could both make a lot of money, you know, if, you know, he could talk Abe into making this deal. [R.T. 610.] The amount of money mentioned was $10,000.00.

Petitioner said he did not want to get involved. [R.T. 611.] Smith testified that he mentioned money again and told petitioner that he, Smith, was very strapped for money and that it would help him out. He just kept harping on the money. [R.T. 611.]

Petitioner listened and then again said "no," that he didn't want to get involved with it. [R.T. 611.]

Smith testified that it was his intention to have petitioner arrested so that it would help his own case. "I was hoping that Irv would be arrested and it will relieve, you know, the pressure off my case and I would keep myself from going to jail, which is what I was working on". [R.T. 613.]

Smith told the petitioner to come over to his place and listen to a phone call which he, Smith, would place to a man who wanted to buy hashish. Then petitioner could decide what he wanted to do. [R.T. 614.]

On cross-examination Smith testified that he placed telephone calls to Agent Swanson, and that durig the course of one of the calls petitioner picked up the telephone and proceeded to talk with Swanson. [R.T. 618. Later that day Smith introduced petitioner to Agent Swanson. [R.T. 618.] Mr. Geha was present at the time. [R.T. 628.]

After petitioner's arrest Mr. Smith spoke with one of the narcotics agents, probably Arthur Barnes. [R.T. 625-626.] His Van Nuys case was disposed of after petitioner's arrest.

Following the testimony of Mr. Smith, the defense rested. [R.T. 649.]

The prosecution called no witnesses in rebuttal and the case was submitted to the jury on that state of the evidence. After some considerable amount of deliberation, the jury submitted the following two questions at R.T. 756:

> "1. Entrapment. Is this the situation whereby the defendant by the acts of the Government is induced to do something he would not normally do. Define normally."
>
> "2. Can someone who regularly deals in narcotics be entrapped in a narcotics deal?"

In this case, the evidence of entrapment was uncontroverted and the only witness who testified on the subject was Mr. Smith. The uncontroverted testimony of Smith was very clear that the idea for the crime was his and he had to induce petitioner and offer him $10,000 before petitioner finally agreed to become part of the transaction after initially refusing several times. There was no evidence of any prior propensity of disposition on the part of petitioner to violate the law.

The Court in denying the defendant's motion for judgment of acquittal assumed the jury was concerned about petitioner's initial statement to Swanson that he was dealing in all kinds of narcotics, preferred to deal in large quantities, and had a special connection for hashish. That assumption might well have been correct in view of the two jury questions above described which the Court declined to answer as requested by defense counsel regarding the second such question.

In denying the defendant's motion for judgment of acquittal and refusing to instruct the jury that a person who regularly dealt in narcotics could be entrapped, the Court made the erroneous assumption that one who regularly dealt in narcotics could not be entrapped as a matter of law. The issue is whether or not *this crime* would have been committed without the inducement and persuasion of the government agent, Norman Smith, and whether petitioner would have committed the crime *whenever* afforded the opportunity and whether Smith did no more than give him that opportunity. The uncontroverted evidence in this case answers each of the preceding questions in the negative.

If a criminal sells narcotics every day of the week except Tuesday for some personal reason but is induced and persuaded over his numerous objections and obvious reluctance to sell narcotics on Tuesday because of an inordinately large amount of money ($10,000), and other inducements, offered to him by a goverment agent, he too is entrapped as a matter of law and his conviction will not be allowed by the Courts.

This is clearly the law in the Ninth Circuit as set forth in the recent case of *Carbajal-Portillo v. United*

States, 396 F. 2d 944 (9th Cir. 1968). In that case, the appellant Carbajal was a Mexican National who resided near the City of Mazatlan in the interior of Mexico. He was offered $500 if he would take a package of heroin to Mexicali, a City near the California border and sell it to a man named Palomares. Carbajal, with the heroin in a paper bag made the 1,000 mile trip to Mexicali in a bus. He found Palomares who told him that he (Palomares) had no money for the heroin and "*suggested*" to Carbajal that he go across the border into the neighboring City of Calexico, California, and sell the narcotics to a Mr. Ricos. Carbajal left the heroin in Mexico and met Ricos in Calexico who wanted to buy 16 ounces of heroin and they agreed upon a price therefore. Ricos wanted the heroin delivered in Calexico because, he told Carbajal, he was a parole violator who could not go into Mexico and if there was to be a sale, it would have to be in the United States. Carbajal initially expressed his reluctance to bring heroin into the United States but finally agreed to do as Ricos requested. As it turns out, Ricos was a federal narcotics agent and Carbajal was arrested when he brought the heroin into the United States. 396 F. 2d 945-6.

As the opinion in Carbajal-Portillo pointed out, the appellant was a man ready, willing and able to sell heroin in Mexico "but the crimes of which Carbajal was accused and convicted involved importation of narcotics *into this country* and selling it *here*, in violation of the laws of the United States. It is uncontroverted that Carbajal initially was reluctant to commit these crimes, and that he would not have done so except for the persuasion, deceitful representation and inducement by Ricos, the narcotic agent". (396 F. 2d at 946.)

Would not the same words and rationale apply here with equal force? The rationale of the United States Supreme Court in *Sorrels v. United States,* 287 U.S. 435, 445 (1932) and set forth by Judge Ely in *Notaro v. United States,* 363 F. 2d 169, 173 (9th Cir. 1966) as follows:

> "It was not thought to be right and just that a Government should instigate and successfully pursue prosecution for the commission of an act which the prosecuted would not likely have committed but for the importunity of an agent of the Government itself."

It is submitted that the Court erred in denying the petitioner's motion for judgment of acquittal.

It is this denial and the subsequent third trial that subjected petitioner to double jeopardy.

The double jeopardy clause of the Fifth Amendment provides: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *." While it is absolute in its terms, it is undisputed that it is not absolute in application. "From *United States v. Perez,* 9 Wheat. 579, 6 L. Ed. 165, decided in 1827, *Gori v. United States,* 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901, decided in 1961, it has been agreed that there are occasions when a second trial may be had although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent." *Downum v. United States,* 372 U.S. 735, 735-736, 83 S. Ct. 1033, 1034 (1963). As the Court in *Downum* pointed out, the classic example of a situation in which the first jury is discharged without reaching a verdict yet a retrial is permitted is a mis-trial because the jury is unable to agree. Other situations

held to justify the discontinuance of a trial without a bar to a subsequent trial have been the tactical problems of an army in the field (*Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834 (1949)); discovery during the course of a trial that jury members were biased (*Wade v. Hunter, supra; Simmons v. United States*, 142 U.S. 148, 12 S. Ct. 171 (1891); *Thompson v. United States*, 155 U.S. 271, 15 S. Ct. 73 (1894)). In general, it has been stated that "the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an imperious necessity to do so." *Downum v. United States, supra*, 372 U.S. at 736; *Cornero v. United States*, 48 F. 2d at 69 (9th Cir. 1931).

In *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221 (1957) the court enunciated the guiding "double jeopardy" principles. It first emphasized that the constitutional prohibition against double jeopardy is 'not against being twice punished but against being twice put in jeopardy.' *United States v. Ball*, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed 300." *Downum v. United States, supra*, 372 U.S. at 736. The Court said:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense * * * The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subject-

ing him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Green v. United States, supra, 355 U.S. at 187 to 188.

In keeping with the principle underlying the constitutional guarantee, the Court in *Downum* and *Green* recognized that "harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." *Downum v. United States, supra,* 372 U.S. at 736. It is submitted that an examination of the circumstances under which petitioner's second trial was declared a mistrial demonstrate that there was no compelling reason to discharge the jury. Consequently, this case is not the ordinary situation in which a jury is unable to agree upon a verdict, and the Court declares a mistrial compelling the defendant to stand trial again without deprivation of his constitutional right to be protected against double jeopardy. On the contrary, this is a situation in which petitioner has been subjected to harassment because of successive prosecutions, and in which the declaration of a mistrial afforded the prosecution a more favorable opportunity to convict.

At all three trials Petitioner's defense was entrapment. At the second trial, evidence of entrapment was wholly undisputed. The government's evidence as to petitioner's involvement in the sale of hashish was not materially disputed. Instead, petitioner's only witness, testified that he repeatedly pleaded with petitioner to

engage in the transaction, and did so for his own ends. The prosecution's chief witness, Agent Swanson, testified that he had no idea what had taken place between the informant Smith and petitioner prior to his first meeting with appellant. It was on this state of the evidence that the case went to the jury.

The jury had been given a general instruction on entrapment. That it was concerned about the defense is evidenced by the fact that the jury requested a re-reading of the informant's testimony. This request was complied with. After some further deliberation by jury returned with two questions, set forth in full in the Statement of Facts above. Both questions related to the legal possibility of an entrapment defense for ones who may have previously engaged in similar crimes. Although counsel for petitioner requested that the Court inform the jury that the defense was available to one who regularly deals in narcotics the Court refused to do so. The entrapment instruction, with its language which makes the defense available to one who has "had no previous intent or purpose to commit *any offenses of the character here charged*" was again read to the jury. The jury was unable to go beyond the point it had reached when it asked for special instructions, and a mistrial was therefore declared. Petitioner neither requested the mistrial nor did he consent to it.

The Court erroneously refused to instruct the jury as requested by petitioner. It is plain that the jury was confused with reference to a crucial element of the case—the defense of entrapment. In general it is the duty of the Court to properly instruct the jury so that it may evaluate the facts and arrive at a verdict. "When a jury makes explicit its difficulties a trial judge should

clear them away with concrete accuracy. *Bollenbach v. United States,* 326 U.S. 607, 66 S. Ct. 402 (1946).

The answer to the jury's question wes plainly "yes". In *Sherman v. United States,* 356 U.S. 369, 78 S. Ct. 819 (1958) the Supreme Court found entrapment as a matter of law as to a defendant who had twice previously been convicted of similar offenses.

Petitioner never agreed to the declaration of a mistrial, and urged the Judgment of Acquittal, and made a motion to dismiss on grounds of double jeopardy after the mistrial. His mere silence when the jury was discharged did not give up his right to raise the issue. *Himmelfarb v. United States,* 175 F. 2d 924 (9th Cir. 1953). And the erroneous denial of the Motion for Judgment of Acquittal and the granting of the new trial placed petitioner in double jeopardy. *Cf. Sapir v. United States,* 348 U.S. 373, 75 S. Ct. 423 (1955) (Mr. Justice Douglas, concurring).

IV.

This Court Should Grant Certiorari to Determine Whether Petitioner's Motion for a Judgment of Acquittal at the Third Trial Should Have Been Granted on the Ground That the Evidence Showed Entrapment as a Matter of Law.

Assuming, *arguendo,* the appellant's third trial did not constitute double jeopardy, it is petitioner's position that the evidence at that trial established entrapment as a matter of law. The relevant facts have been set forth at some length in the Statement of Facts and in preceding discussion.

In *Sherman v. United States,* 356 U.S. 369, 78 S. Ct. 819 (1958), the defendant had twice been convicted of sales of narcotics. However, the Court dis-

counted the prior involvements and looked to his propensities *at the time* the sales which were the subject of the government's case were committed. See also, *Carbajal-Portillo v. United States,* 396 F. 2d 944 (9th Cir. 1968). In other words, a person need not have a past free of any intent to commit any similar crime in order to avail himself of the defense of entrapment as a matter of law. The *Sherman* Court concluded:

> "The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The Government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the Government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus, the Government plays on the weakness of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."
>
> (356 U.S. at 376.)

Bearing in mind the principles established by the *Sherman* case, and particularly the position expressed by the four concurring Justices, this Court should find entrapment as a matter of law in the instant case. For the thrust of the concurring Justices' position in *Sherman* is that there is a minimum level of decency beyond which officers cannot go in enticing persons to commit crimes. If that performance is sufficiently substandard it is immaterial that the defendant may have been willing to become criminally involved. Mr. Justice Frank-

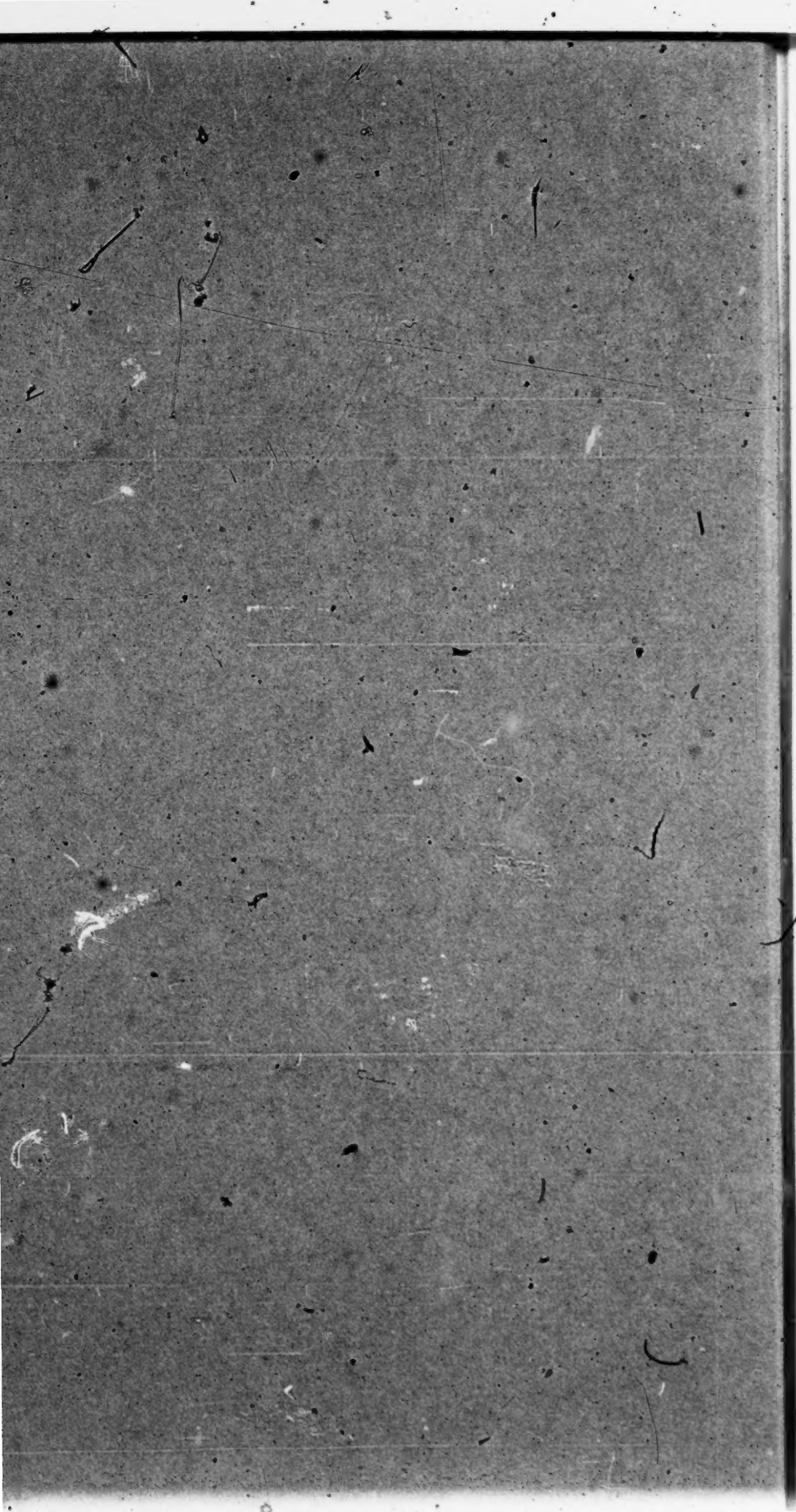
furter speaking for those Justices traced the history of the entrapment doctrine to the feeling of outrage at the conduct of law enforcers. The Justice formulated the principle as follows:

> "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced."

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

ROBERT M. TALCOTT and
RICHARD G. SHERMAN,
Attorneys for Irwin Berniker,
Petitioner.



APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, *Plaintiff*, v. Irwin Berniker, *Defendant*. No. 26,204.

[March 19, 1971].

Appeal from the United States District Court for the Central District of California.

Before: BARNES, KOELSCH, and HUFSTEDLER, Circuit Judges

PER CURIAM:

Appellant was convicted for illegal traffic in hashish in violation of 21 U.S.C. § 176a. Only three of his contentions on appeal from that conviction merit discussion.

First, he claims that the district court abused its discretion in declaring a second mistrial and that his third trial was therefore in violation of the double jeopardy clause of the Fifth Amendment. The jury expressed its inability to reach a verdict upon the second trial. Appellant's theory is that the jury would not have been deadlocked at the second trial had the jury been more fully instructed upon certain questions the jury asked about entrapment during their deliberation. Even if appellant's theory were correct, a point we do not decide, we reject the argument that an error in instructions to the jury infects the district court's exercise of its discretion to discharge a deadlocked jury.

Second, he contends that the denial of his motion for judgment of acquittal upon the third trial was er-

roneous because the evidence established entrapment as a matter of law. Without detailing the evidence, we observe that there was testimony, which the jury apparently credited, that appellant himself instigated the transaction and that appellant was dealing in large amounts of hashish. Under such circumstances, we cannot say that appellant had been entrapped as a matter of law.

Third, he complains about an instruction to the jury in the third trial about a defendant's attempt to influence the testimony of a witness. The instruction referred to one Norman Smith. Smith had testified in appellant's favor on the entrapment issue in the second trial, but he recanted in the third trial and then testified for the Government. Here, again, viewing the evidence favorably to the Government, there was testimony from which the jury could have concluded that appellant had attempted to influence Smith to obtain the favorable testimony he had given on the second trial.

The judgment is AFFIRMED.

No. 71-101

Supreme Court, U.S.
FILED
SEP 17 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

IRWIN BERNIKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-101

IRWIN BERNIKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was found guilty of concealing and transporting hashish in violation of 21 U.S.C. (1964 ed.) 176a. He was sentenced to imprisonment for five years and thirty-three days. The court of appeals affirmed *per curiam* on March 19, 1971 (Pet. App. A; 439 F.2d 686). The time for filing a petition for writ of certiorari was extended by order of Mr.